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No. 08-920

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BRYAN MEDIA, INC.,

Petitioner,

v.

CITY OF ST. PETERSBURG, FLORIDA, *ET AL.*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The facts of this case occurred in two distinct phases. The first phase began when a contractor for the City of St. Petersburg, employed to erect a large concrete monument marking the site of an industrial project on city-owned land, took down a pair of outdoor advertising signs belonging to the Petitioner, Bryan Media (herein, "Bryan"). The signs stood on railroad right of way adjoining the city property. The contractor took the signs down because they blocked the access that he needed to install the monument on the city property . (Pet. Apx. B at 7a, 8a, 19a)

The contractor acted upon the authorization of a city employee, Ron Barton, who authorized the contractor to take the signs down when the contractor arrived at the job site. Mr. Barton had earlier determined that no record of any permit for the signs could be found in city records. (Pet. Apx. B at 8a) The signs were damaged by the contractor. Bryan, not the City or its contractor, removed the signs from the site and placed them in storage. (Pet. Apx. B at 8a, 9a)

After Bryan's signs were taken down, Mr. Barton noticed other outdoor advertising signs he did not recall seeing before. He conducted a "windshield survey" and noted the sign locations on a map. During or before April of 2004, Mr. Barton sent his findings to the City's permitting department to determine whether permits had been issued for them. (Pet. Apx. B at 9a, 25a) The record shows no further involvement by Mr. Barton after his findings were turned over to the permitting department.

The second phase of this case began in June of 2004, approximately six months after the signs were taken down, when Bryan re-erected outdoor advertising signs on the same site. (Pet. Apx. B at 9a)

On August 4, 2004, the City sent notices of violation to the railroad company and to Bryan, and to the owners of seven other sites where outdoor advertising signs were found without a permit. (Pet. Apx. B at 9a, 10a) Bryan's signs appeared on six of the eight sites including the railroad property where Bryan had re-erected the signs. (Pet. Apx. B at 10a, 24a, 26a) The notice to the railroad company prompted a letter to Bryan advising that its license agreement was subject to cancellation in the absence of proof of the requisite permits. (Pet. Apx. B at 10a, 32a)

On November 18, 2004, the city's code enforcement board conducted a hearing on the violation notices sent to the railroad company and to Bryan. The board ruled that the signs were unlawful. The board gave Bryan until December 17, 2004, to submit its permit or remove the signs. (Pet. Apx. B at 10a)

Bryan sought judicial review of the board's order in the Circuit Court of the Sixth Judicial Circuit of Florida. As the District Court noted, the board's decision was quashed by the state court because the board failed to abide by its oral decision giving Bryan thirty days in which to locate a permit for the signs. The case was remanded back to the board. (Pet. Apx. B at 12a, 42a) The District Court noted that a final determination on whether the signs were lawfully erected is a determination for the city's code enforcement board.

The Court also noted that the board's final determination had not been filed with the District Court when the Court granted the motions of the City, Mr. Barton, and other city employees on all counts. (Pet. Apx. B at 23a)

This Court should be aware of subsequent developments in the state court after the board's order was quashed. The case was not taken back to the board. In 2007, after the City acquired the railroad property for use as a bicycle trail, Bryan's signs were still in place. The City initiated a new code enforcement case against Bryan which the code enforcement board heard on November 28, 2007. The board again determined that the signs were in violation of the city code, as being maintained without a permit. Bryan again sought judicial review of the board's decision. The state court affirmed the decision after finding that competent substantial evidence supported the board's findings and that the essential requirements of law were "not only observed but exhausted." *Bryan Media v. City of St. Petersburg*, Appeal No. 07-000073-AP-88B (Fla. 6th Cir., Dec. 3, 2008), Order and Opinion, at 3. A copy of the Order and Opinion is attached hereto as Exhibit A. That order is not final, but is pending on a petition for writ of certiorari to the Second District Court of Appeal of Florida, *Bryan Media v. City of St. Petersburg, petition for cert. filed*, Case No. 2D08-6413 (Fla. 2d DCA, Dec. 31, 2008).

REASONS FOR DENYING THE PETITION

The decision below does not conflict with a relevant decision of this Court or any decision of any Court of Appeals or a state court of last resort, and does not depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power. Supreme Court Rule 10.

I. The decision does not conflict with relevant decisions of this Court with respect to protected property interests under the procedural category of the Due Process Clause

Bryan initially argues that the decision of the Eleventh Circuit Court of Appeals conflicts with the "landscape of protected property interests under the procedural category of the Due Process Clause." More specifically, Bryan argues that, when the contractor took down the signs to gain access to the City's property, Bryan was deprived of what it calls a state-created "notice and hearing benefit," or a benefit derived from the right to receive notice and hearing in any case taken to a code enforcement board. Bryan characterizes this "benefit" as a protected property interest. The argument is fanciful. There is no legal authority for it.

Bryan's "notice and hearing benefit as a property right" argument is made here for the very first time during the course of this lawsuit.

Bryan's argument disregards the facts of this case, which show that the taking down of the signs by the

City's contractor predated commencement of code enforcement proceedings by approximately six months. Although Mr. Barton had found no evidence that a permit had been issued for the signs, the signs remained in place until the contractor arrived on the job site. The signs were taken down simply because they were in the contractor's way. When Mr. Barton conducted his survey of signs in the neighborhood, the Bryan signs had not been replaced. After Bryan replaced the signs, the City commenced a code enforcement proceeding by sending out violation notices.

Bryan does not complain that the board heard the case without proper notice and without giving him a right to be heard. Instead, Bryan confuses the taking down of the signs by the contractor with a code enforcement proceeding and argues that the procedures required for taking a case to the board applied months earlier, when the contractor took the signs down.

In effect, Bryan argues that a requirement to give notice and conduct a hearing before a board is a "procedural due process benefit" equating to a protected property interest which, if not followed, is a "taking" without notice and hearing. According to that argument, not giving such a notice and hearing would require a notice and hearing.

In support of this unprecedented theory, Bryan cites Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885 (2002), in which Professor Thomas W. Merrill surveyed decisions of this Court on governmental interference with property under the Due Process Clause (procedural and substantive) and the

Takings Clause and fashioned a method or strategy to reconcile the decisions on the threshold issue of what is "property."

Unfortunately, Bryan gleaned nothing from this article except the title.

Bryan argues a Procedural Due Process taking. Professor Merrill offers a definition of "property" for the purpose of the Procedural Due Process clause which he calls "property as entitlement," which requires asking whether nonconstitutional sources of law confer an entitlement on a claimant having a monetary value that can be terminated only upon a finding that a specific condition has been satisfied. *Id.*, at 893. Examples of "property as entitlement" would be utility services, *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1 (1978), and the right to maintain a cause of action, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

Bryan's claim to a "procedural due process benefit" is not "property as entitlement." The right to notice and a hearing before a code enforcement board has no monetary value and cannot be terminated upon a showing of "cause." The right cannot be "terminated" at all. If a code enforcement board hears a case without notice to the violator and without affording the violator the opportunity to appear and be heard, the board's decision is void. This failure did not occur and Bryan does not argue that it did.

Professor Merrill offers two other definitions of "property" for the purpose of the Takings Clause and the Substantive Due Process Clause which he calls

"property as ownership" and "property as wealth," respectively. Merrill, *supra*, at 893-894, 960, 963. Bryan's claimed "procedural due process benefit" does not fit either definition.

Bryan cites various federal cases in which persons had property interests in benefits under government programs. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (public assistance under the Aid to Families with Dependent Children), and *Bell v. Burson*, 402 U.S. 535 (1971) (driver's licenses and registration), occurred during what Professor Merrill describes as a brief period during which this Court spoke as if procedural due process applied to any interest that is "important," whether or not such interest can be properly categorized as "property" (or "life" or "liberty"). According to Professor Merrill, this period lasted until *Board of Regents v. Roth*, 408 U.S. 564 (1972), in which this Court said, "Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.*, at 577. *Roth* marked the beginning a line of decisions in which this Court has become increasingly insistent that persons seeking protection of economic interests under either the Due Process or Takings Clauses establish that they have "property" if they are to avoid dismissal of their lawsuits. Merrill, *supra*, at 887.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), in which a civil service employee challenged his dismissal for dishonesty, this Court

examined the issue of whether Ohio's pretermination process must be accorded to the employee. The state argued that the employee's property right in continued employment was defined by, and conditioned upon, the state's choice of procedures, an argument which had come to be known as the "bitter with the sweet" argument. The majority of this Court rejected that argument and held that the Ohio statute was constitutionally deficient. This Court said, "The categories of substance and procedure are distinct. . . . 'Property'cannot be defined by the procedures provided for its deprivation." *Id.* at 541.

In *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005), the plaintiff claimed a procedural due process deprivation of a "property interest" in police enforcement of a restraining order against her estranged husband, after her husband murdered their children despite her having called the police for help several times. This Court held that, for the purposes of the Due Process Clause, she did not have a property interest in police enforcement:

> Our cases recognize that a benefit is not a protected entitlement if government officials may grant or deny it in their discretion. [citations omitted] *Id.*, at 756.
>
> * * * * *
>
> Even if we were to think otherwise concerning the creation of an entitlement by Colorado, it is by no means clear that an individual entitlement to enforcement of a restraining

> order could constitute a "property" interest for purposes of the Due Process Clause. Such a right would not, of course, resemble any traditional conception of property. Although that alone does not disqualify it from due process protection, as *Roth* and its progeny show, the right to have a restraining order enforced does not "have some ascertainable monetary value,""as even our "*Roth*-type property-as-entitlement"cases have implicitly required. Merrill, The Landscape of Constitutional Property, 86 Va. L. Rev. 885, 964 (2000) . . . *Id.*, at 766.

In his concurring opinion, Justice Souter added:

> . . . Gonzales claims a property interest in a state-mandated process in and of itself. This argument is at odds with the rule that "[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." [Citations omitted.] . . .
>
> * * * * *
>
> Thus, in every instance of property recognized by this Court as calling for federal procedural protection, the property has been distinguishable from the procedural obligations imposed on state officials to protect it. *Id.*, at 770-771.

* * * * *

> . . . To accede to Gonzales's argument would therefore work a sea change in the scope of federal due process, for she seeks federal process as a substitute simply for state process. . . . Gonzales's claim would thus take us beyond *Roth* or any other recognized theory of Fourteenth Amendment due process, by collapsing the distinction between property protected and the process that protects it, and would federalize every mandatory state-law direction to executive officers whose performance on the job can be vitally significant to individuals affected. *Id.*, at 772.

In the instant case, giving notice and an opportunity to be heard by the code enforcement board was discretionary with city officials, who elected (consciously or otherwise) not to take a case against the signs before the board when they discovered the absence of sign permits. Later, when the signs were re-erected, city officials did decide to take the case to the board and they afforded Bryan with notice and the right to be heard by the board. As in *Castle Rock*, *supra*, Bryan claims a property interest in a process. This argument is at odds with the rule that process is not an end in itself, and that procedure to protect property is not property.

Other cases cited by Bryan do not support its argument. In each of these cases, the question before the Court was whether the Due Process Clause requires that the recipient be afforded the right to be heard

before the termination of benefits. The benefits ranged from disability benefits under the Social Security Act, *Mathews v. Eldridge*, 424 U.S. 319 (1976), to public education, *Goss v. Lopez*, 419 U.S. 565 (1975), to the right to maintain a cause of action, *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). In each case, this Court decided that deprivation of the benefit required some sort of notice and some sort of hearing, but in each case the property interest in a benefit existed apart from procedural protections.

At first glance, *Logan*, *supra*, might arguably support Bryan's contention. Mr. Logan was fired by the brush company for a physical defect which the company believed would interfere with his duties as a shipping clerk. He filed charges with the Illinois Fair Employment Practices Commission, which failed to convene a fact-finding conference within 120 days as required by state law. After the statutory period expired, the Illinois Supreme Court ruled that the Commission lacked jurisdiction to hear the case, thus extinguishing Logan's cause of action. This Court determined that Logan had a protected interest in the right to maintain a cause of action, a cause of action having earlier been found to be a species of property protected by the Fourteenth Amendment. *Logan*, *supra*, at 428, citing *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The right to use the Commission's adjudicatory procedures shared the characteristic of other property interests, which is an individual entitlement which cannot be removed except for cause. The state's 120-day limit was not a substantive element of the claim but a procedural limitation upon the ability of the claimant to assert his rights. *Logan*, *supra*, at 433. Turning to

the question of what process was due, this Court concluded that Logan was entitled to have the Commission consider the merits of his charge, based upon the substantiality of the available evidence, before deciding whether to terminate his claim. *Logan, supra,* at 434.

The instant case is wholly unlike *Logan*. Here, the state-created requirement to give notice and conduct a hearing before a code enforcement board is the process which is due before the board may find someone to be in violation of the codes. A failure to give notice and afford a hearing before the board deprives no person of a right to maintain a cause of action except perhaps the City itself. The right to notice and a hearing is a benefit to the violator only in the sense that a failure to by the City to give notice or a hearing would be a defense, invalidating the board's action if the board should find a violation to exist.

In no case has this Court or any Florida court ever decided that the right to notice and hearing - a "notice and hearing benefit" - is itself a property interest. A "notice and hearing benefit" does not exist as a protected property right within the "landscape of protected property interests" under the procedural category of the Due Process Clause.

II. The decision does not conflict with a decision of any Court of Appeals or a state court of last resort

Bryan's second argument abandons the novel "notice and hearing benefit" theory for a wholly different definition of the property interest at stake. Bryan asserts that the City trespassed upon the railroad property and knocked down the billboards, destroying them or appropriating them to a public use, causing compensable damages. Bryan contends that the "order to remove the billboards" was a compensable taking under the Takings Clause of the Fifth Amendment. Bryan asks whether the City did not "take" the billboards when it "destroyed" them.

By "order to remove the billboards," Bryan presumably refers to the taking down of the signs by the city's contractor, after which the signs were removed by an employee of Bryan. There was no "order" to remove the signs until the code enforcement board, after notice and hearing, found that the signs violated the city code.

Bryan describes the taking down of the signs by the city's contractor as both a trespass onto railroad property and a destruction of Bryan's personal property. Regarding the alleged trespass, which is raised here for the very first time during the course of this lawsuit, the record does not show that the railroad company ever complained about a trespass and there is no evidence of damage to the railroad property. The record does not show that the trespass, if a trespass occurred, was continuing or permanent. Bryan had only a revocable

agreement, and in fact received notice that the agreement was subject to cancellation in the absence of proof of the requisite permits.

Regarding the claim for destruction of the billboards, the District Court noted that, "The evidence does not show and Plaintiff [Bryan] does not contend that Defendant Barton and the City deprived Plaintiff of the subject billboards, only its unarticulated right, presumably, to display the unpermitted billboards." Order, Appendix B, at 23a. The court concluded that Bryan failed to establish a property interest under Florida law for a claimed right to erect the unlawful billboard. Order, Appendix B, at 23a.

With respect to Count VI, the District Court also noted that, "Plaintiff contends that violation notices sent by the City constitute a taking of Plaintiff's [Bryan's] property." Order, Appendix B, at 41a. The court concluded that the only evidence before the court was that the signs were unlawful, and Bryan demonstrated no property interest in the signs to justify a takings claim. Order, Appendix B, at 43a.

Bryan now wishes to make it clear, as it never has before, that its Takings Clause claim is based upon destruction of personal property – i.e., the sign structures. This is a tort claim disguised as a Fifth Amendment takings claim.

Bryan misapprehends the differences between federal law and state law with respect to claims arising in tort.

The Takings Clause prohibits the taking of private property for public use without just compensation. U.S. CONST. amend. V.

Bryan's first obstacle is that the signs were not taken for public use.

Bryan's next, and fatal, obstacle is a lack of subject matter jurisdiction over this claim because the claim was not ripe. Specifically, before asserting a Takings Clause claim in federal court, Bryan was required to seek compensation through appropriate state channels. No constitutional violation occurs until compensation has been denied. *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson County* 473 U.S. 172, 195 (1985). *Accord, Peters v. Village of Clifton*, 498 F.3d 727 (7th Cir., 2007), in which a claim for trespassing and an unconstitutional taking was dismissed because the plaintiff had not exhausted his remedies in state court, where "exhaustion" was used as shorthand for the rule that no constitutional violation occurs until just compensation has been denied, and, therefore, resort to state procedures is necessary. *Peters, supra*, at 730 n. 4. *See, also, Watson Construction Co. v. City of Gainesville*, 244 Fed. Appx. 274, 2007 U.S. App. LEXIS 14298 (11th Cir., 2007) (federal takings claim was not ripe and, therefore, federal courts have no jurisdiction over it).

Florida law provides an adequate procedure for seeking just compensation under an inverse condemnation claim. *Reahard v. Lee County*, 30 F.3d 1412 (11th Cir. 1994).

Bryan argues conflict with decisions of the Florida Supreme Court, specifically *Selden v. City of Jacksonville*, 10 So. 457 (Fla. 1891), *White v. Pinellas County*, 185 So.2d 468, 471 (Fla. 1966), and *State Road Dept. of Florida v. Tharp*, 1 So.2d 868, 870 (Fla. 1941). These decisions are not in conflict with the decision of the Eleventh Circuit. Two of these cases, *White* and *Tharp*, demonstrate that a state court remedy is available in inverse condemnation under Florida state law.

White, supra, was an action for damages following the removal by the county of vegetation growing on private property pursuant to a planned program of highway improvement. The Florida Supreme Court reversed summary judgment for the county and remanded with instructions for a trial by jury. The Florida Supreme Court's decision does not explain which Constitution the court was applying, but the intermediate appellate court referred specifically to the Florida Constitution. *White v. Pinellas County*, 174 So.2d 88, 90 (Fla. 2d DCA 1965).

In *State Road Dept. of Florida v. Tharp, supra*, the owner of a water mill sued a state agency following the erection of a bridge and fill which raised the elevation of the water in the mill race, reducing the capacity of the mill. The plaintiff alleged a taking for the benefit of the public without due process, and alleged that the taking constituted a continual trespass and an irreparable injury. The question before the Florida Supreme Court was whether the Florida Constitution made the state "nonsuable." The Court decided that the

state necessarily had to be suable in such a case in order to afford relief under the Florida Constitution's takings and property rights clauses.

Selden, *supra*, was an unsuccessful attempt by an owner of property adjoining a public street to enjoin a city from changing the grade of the street. The Florida Supreme Court held that consequential damages to property abutting a public street did not constitute a "taking" or an "appropriation" under the Florida Constitution. The relevancy of that decision to the instant case is not explained.

Bryan also cites decisions from Florida's First and Fifth District Courts of Appeal, *Hernando County v. Anderson*, 737 So.2d 569 (Fla. 5th DCA 1999), and *Kirkpatrick v. City of Jacksonville*, 312 So.2d 487 (Fla. 1st DCA 1975). They are not "courts of last resort" in Florida. Any arguable inconsistency falls outside the purview of Rule 10 of this Court. Even so, the cases are distinguishable. In *Hernando County*, *supra*, a billboard company's lease expired. The county acquired the land, then removed and destroyed the billboards in the mistaken belief it had also acquired the billboards and had the right to do so. The county was found liable under inverse condemnation. In the instant case, the record lacks any evidence showing that the City intended to remove the signs permanently or believed it had the right to do so.

In *Kirkpatrick*, *supra*, the City of Jacksonville demolished buildings on private property without notice and, allegedly, without justification. The appellate court ruled that the city could be liable for compensation for inverse condemnation under the Florida Constitution.

In the instant case, the record does not show that the City intended to demolish the signs and does not show that damage to the signs was wilful.

The decision of the Eleventh Circuit is not inconsistent with these cases.

III. The decision does not conflict with this Court's summary judgment standards

For its third argument, Bryan seeks "guidance" from this Court on the application of Rule 56, arguing that the decision of the Eleventh Circuit Court of Appeals conflicts with this Court's summary judgment standards. Bryan contends the City had a burden of proof regarding Mr. Barton's acting only with "mere negligence."

Adickes v. S.H. Kress & Company, 398 U.S. 144 (1970), does not support Bryan's position because the facts and the holding are entirely different. In that case, this Court found an unresolved issue regarding a possible conspiracy between a police officer and employees of a Kress store who had refused to serve food to Adickes and a mixed group of whites and blacks. This Court pointed out that Kress had not submitted any affidavits from two waitresses who had been present and had successfully refused to allow one waitress's deposition to be taken. Kress failed to meet its burden of proof because of what this Court called "gaps" in the materials Kress submitted.

Here, the District Court found no such gaps. The District Court found that the evidence did not support

the allegation of retaliation or that Bryan was targeted, and did not support the allegation that City officials acted with constitutionally invidious motives such as interference with the legitimate exercise of constitutional rights. These findings were based upon a record consisting of affidavits and deposition testimony of City employees and former employees, and Mr. Bryan himself. The City did not refuse to allow any of its employees to have their depositions taken. Bryan has not identified any witness whose testimony might be relevant to the issue of motive but whose testimony is not included in the record. The decision below does not conflict with this Court's summary judgment precedents.

Bryan's argument is not supported by *Daniels v. Williams*, 474 U.S. 327 (1986), which stands for the proposition that the Due Process Clause is not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty or property. In that case, an inmate sought damages after slipping on a pillow negligently left on a stairway by a sheriff's deputy. The inmate conceded that the jail officer was at most negligent. *Id.*, at 334 n. 3. Whether the officer met his burden of proof under Rule 56 was not an issue in that case.

Here, the City complied with the standard of proof set forth in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). This Court's analysis of Rule 56 is that summary judgment is mandated after adequate time for discovery and upon motion, against a party who fails to establish the existence of an element essential to that party's case and on which that party will bear the burden at trial. In such a case, the moving party is entitled to a

judgment as a matter of law. *Id.*, at 322-23. This Court went on to say that the decision in *Adickes*, *supra*, should not be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact. Rather, it is sufficient if the moving party "shows" – that is, points out to the district court - that there is an absence of evidence to support the nonmoving party's case. *Id.*, at 325.

The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986). Bryan had to produce definite competent evidence to create a genuine issue of material fact. *Albiero v. City of Kankakee*, 246 F.3d 927, 932 (7th Cir. 2001). Bryan failed to do so, and the courts below ruled correctly.

IV. The decision does not conflict with decisions of this Court regarding post-deprivation remedies

Finally, Bryan argues that the decision of the Eleventh Circuit Court of Appeals is a "radical departure" from this Court's post-deprivation remedy cases. Bryan seeks guidance from this Court regarding whether the government's mere inconvenience is sufficient to invoke post-deprivation remedies.

This claim does not appear to be based upon Bryan's "notice and hearing benefit" theory discussed under Point I. The concept of requiring a notice and hearing

before depriving someone of their right to notice and hearing is an absurdity.

Bryan's claim is predicated on his contention that the taking down of the signs by the City's contractor was a "taking." The District Court found that the taking down of the signs was not a taking in the constitutional sense because of a lack of evidence that Bryan was legitimately exercising a constitutionally protected right.

The District Court noted that the evidence did not show, and Bryan did not contend, that the defendants deprived Bryan of the subject billboards, only its unarticulated right, presumably, to display the unpermitted billboards. Even assuming that Bryan had established a protected interest in displaying the billboards on the railroad property, Bryan was given notice and an opportunity to be heard by the code enforcement board, and review of the board's decision by the state's circuit court, thus providing sufficient process post-removal.

Viewing the signs as personal property under the perspective Bryan adopts for this argument, Bryan's claim is based upon damage to the signs negligently inflicted by the contractor at the time the signs were taken down. The record demonstrates no wilful intent on the part of Mr. Barton or other City employees to damage the signs, but merely to allow a contractor to remove them in order to have access to adjoining City-owned property. Notice is not required in advance of an act of negligent damage.

In *Zinermon v. Burch*, 494 U.S. 113 (1990), Burch brought suit after being involuntarily admitted to a state mental hospital and detained for five months. He had been asked to sign consent forms despite being incapable of making an informed decision as to his admission. Florida law provides for a court-ordered evaluation of anyone meeting the criteria for detention and provides a patient with a right to notice, a judicial hearing, appointed counsel, access to medical records and personnel, and an independent medical examination before involuntary placement. *Id.*, at 122-23. Unlike the instant case, the detention of Burch was not accidental nor was it a negligent by-product of work by a contractor for the state agency.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), where classified civil servants who could be dismissed only for cause had been dismissed without a hearing, this Court held that the employees were entitled to pre-termination process. There was no question but that the employees had a property interest in continued employment. A post-termination appeal to a civil service commission was deemed insufficient. Unlike the instant case, the termination was not accidental nor was it a negligent by-product of work by a contractor for the board of education.

Other cases cited by Bryan are similar in that, in each case, the act was neither accidental nor negligent. *Parham v. J.R.*, 442 U.S. 584 (1979) (where a determination as to admission standards by a neutral physician was required before confinement of a child in a mental hospital); *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1 (1978) (where a hearing was required

before cutting off utility service); *Goss v. Lopez*, 419 U.S. 565 (1975) (where some kind of notice and some kind of hearing was required before suspension of students from a public school); *Wolff v. McDonnell*, 418 U.S. 539 (1974) (where a hearing was required before the forfeiture of a prisoner's good time credits); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (where a hearing was required before issuance of a writ allowing repossession of property); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (where a hearing was required before termination of welfare benefits).

Palazzo v. Rhode Island, 533 U.S. 606 (2001), is a regulatory takings case, in which an inverse condemnation action was brought in state court after applications for the development of waterfront property were rejected. This Court, reviewing a decision of the Supreme Court of Rhode Island, held that the case was ripe because the state agency had made clear its intention to allow no development of the property, but the owner did not suffer a total deprivation of all economic value, and so the case was remanded. In that case, unlike the instant case, the owner had exhausted his remedies in state court before reaching this Court.

Some of the cases cited by Bryan support the City's position.

In *Logan*, *supra*, where Logan had been deprived of the right to maintain a cause of action before an adjudicatory body, the remedy was a hearing before the adjudicatory body. This Court outlined exceptions when a pre-deprivation remedy may not be possible or

practicable, or when the state cannot predict or guard in advance against a deprivation. When any pre-deprivation process is not practicable, a post-deprivation remedy may be adequate. *Id*, at 436.

In *Ingraham v. Wright*, 430 U.S. 651 (1977), a suit brought by the parents of public school students following their disciplinary paddling, this Court affirmed the holding below that the Due Process Clause does not require prior notice and a hearing before the school may impose corporal punishment. This Court held that traditional common-law remedies for excessive corporal punishment under Florida law were fully adequate to afford due process. This Court declined to create a rule requiring a hearing in advance of any paddling, however moderate or trivial. *Id.*, at 680.

In *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974), where a court issued a writ of sequestration to recover household goods from a defaulting buyer of the goods, but without notice to the buyer and without a hearing, this Court held that issuance of the writ did not violate procedural due process under the Fourteenth Amendment because Louisiana law protected the buyer.

In some cases, post-deprivation tort remedies are all the process that is due, simply because they are the only remedies the state could be expected to provide. *Parratt v. Taylor*, 451 U.S. 527 (1981) (inmate's claim arising from negligent loss of property); *Daniels*, *supra* (injury caused by mere negligence is not a deprivation within the meaning of the Due Process Clause).

This Court has rejected reasoning that would make of the Fourteenth Amendment a "font of tort law" to be superimposed upon whatever systems may already be administered by the States. *Paul v. Davis*, 424 U.S. 693, 701 (1976). The Due Process Clause does not transform every tort committed by a state actor into a constitutional violation. *DeShaney v. Winnebago County Dept. of Social Services,* 489 U.S. 189, 202 (1989).

The decision of the Eleventh Circuit does not conflict with decisions of this Court regarding post-deprivation remedies.

CONCLUSION

For the foregoing reasons, the Respondents ask this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX — ORDER AND OPINION OF THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, PINELLAS COUNTY, FLORIDA, APPELLATE DIVISION DATED DECEMBER 3, 2008

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT IN AND FOR PINELLAS COUNTY, FLORIDA APPELLATE DIVISION

Appeal No.: 07-000073AP-88B
UCN: 522007AP000073XXXXCV

BRYAN MEDIA, INC.,

Petitioner,

v.

CITY OF ST. PETERSBURG,

Respondent.

ORDER AND OPINION

THIS MATTER came before the Court on Petitioner, Bryan Media Inc's, Petition for Writ of Certiorari filed December 27, 2007. An Order to Show Cause was issued by this Court on January 11, 2008 and Respondent, City of St. Petersburg, subsequently filed a response. Petitioner seeks review of the November 28, 2007 decision by the Code Enforcement Board (hereinafter "The Board") finding the signs owned by Petitioner were in violation of the City's sign code, as being maintained without a permit.

Appendix

Facts

Petitioner is an outdoor advertising company who owns two adjacent billboards located on a vacant lot at 498 22nd Street S., St. Petersburg. The lot is owned by the City. After giving notice to Petitioner, the Code Enforcement Board held a hearing on November 28, 2007 wherein a City code inspector and a City sign examiner testified on behalf of the City. The code inspector testified the property was originally inspected on August 3, 2004 and re-inspected on September 7, 2004; the matter previously came before the Code Enforcement Board on November 17, 2004. Due to a change in ownership of the property and a later filed internal complaint, the property was re-inspected on August 7, 2007 and again on November 19, 2007. The facts in this case only pertain to Petitioner's October 2, 2007 cited code violation.[1]

The billboards were first erected on the property in July of 1963. Petitioner asserts the billboards were erected before the City required permits. The original lease including all subsequent lease transfers were submitted by Petitioner. In March of 2003, Petitioner obtained ownership through a purchase from Tampa Bay Jr. Posters, Inc. Petitioner argues the current lease can be traced back to the original 1963 lease and therefore, the 1963 City Code is applicable. The 1963 City Code does not require a permit and as such Petitioner argues

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1. Specifically, Chapter 16, Sec. 16.40.120.18 and 16.40.120.3.3.

as the current lease holder, they are grandfathered in and therefore not in violation of the current city code.

Discussion

In review of a quasi-judicial decision by the Code Enforcement Board, the Court is to consider (1) whether the agency afforded procedural due process; (2) whether the agency observed the essential requirements of law; (3) whether competent, substantial evidence supported the agency's findings and judgment. U.S.C.A. Const. Amend. 14., *Powell v. City of Sarasota,* 953 So.2d 5 (Fla.2nd DCA 2006). Petitioner's argument only addresses the second and third prong of analysis.

The record before this Court contains a recorded DVD documenting the testimony presented at the November 28, 2007 Code Enforcement hearing. Also included in the record are the exhibits submitted at the hearing, such as, photographs, correspondence, the applicable lease, copies of the 1963, 1973, 1981, and current City Code, as well as the citation for code violation. This Court relies heavily on the recorded testimony presented at the hearing before the Board. After review, the Court is satisfied that competent substantial evidence supported the Board's findings.

Petitioner argues the Board refused to consider its defenses of equitable estoppel and laches and therefore failed to observe the essential requirements of law. Again, this Court is satisfied the essential requirements of law were not only observed but exhausted. This Court

has also considered the opinion from the United States Appellate Court for the Eleventh Circuit, No. 07-10189, *Bryan Media, Inc. v. City of St. Petersburg* rendered September 12, 2008 in this matter and further affirms the decision by the Code Enforcement Board.

It is hereby:

ORDERED AND ADJUDGED that Petitioner's Writ of Certiorari is denied with prejudice.

DONE AND ORDERED in Chambers, at St. Petersburg, Pinellas County, Florida this 3 day of December, 2008.

s/ Amy M. Williams
AMY M. WILLIAMS
Circuit Judge, Appellate Division

s/ Peter Ramsberger
PETER RAMSBERGER
Circuit Judge, Appellate Division

s/ J. Thomas McGrady
J. THOMAS MCGRADY
Circuit Judge, Appellate Division